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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 582

WILLIAM SQUIRE NEAL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND MOTION TO DEFER CONSIDERATION THEREOF.

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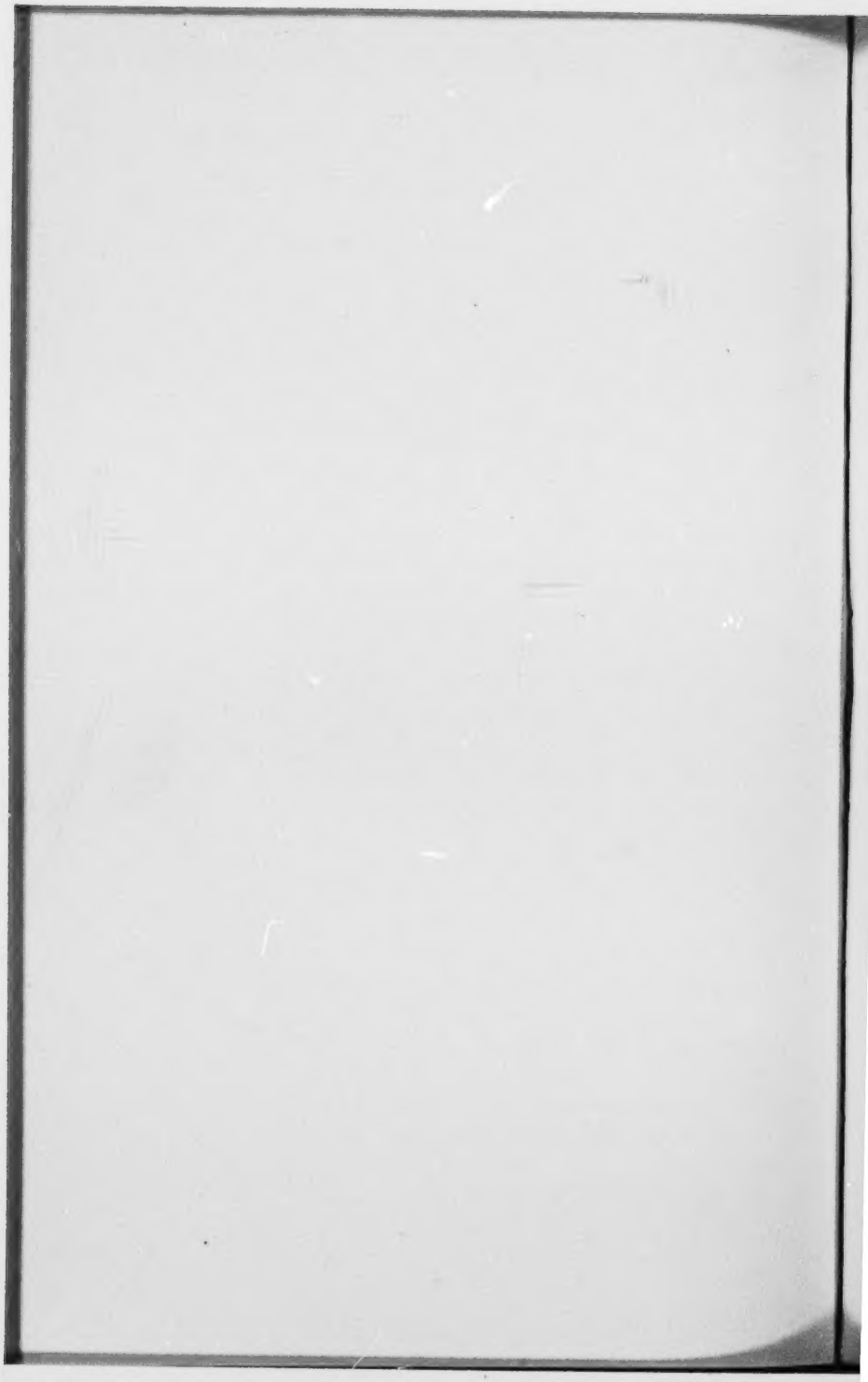

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 582

WILLIAM SQUIRE NEAL, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner respectfully prays for the issuance of a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Eighth Circuit.

Opinions Below.

The opinion below in the first appeal is reported at 102 F. (2d) 643, and is reprinted as an appendix to the present Petition (P. 11). The opinion below of which review is asked is unreported but found in the record at page 586.

Jurisdiction.

The judgment below was entered October 15, 1940 (R. 590). A motion for leave to file and a Petition for Rehear-

ing subsequent to the expiration of the fifteen days allowed for such petitions by Rule 18 of the Rules of the Eighth Circuit was filed November 19, 1940. Even though such petition should be denied the present petition is still timely.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended.

Summary Statement of the Matter Involved.

The petitioner was tried twice for the offense of being accessory after the fact in respect of the theft by his brother of certain money from a national bank, a crime only made an offense by the Act of August 24, 1937 (12 U. S. C. A. Sec. 588(b), 50 Stat. Chap. 747, p. 749). At the first trial he made a motion for a directed verdict on the ground that there was no evidence to show that the currency found in his possession and supposed to have been a part of the fruits or proceeds of the theft was stolen subsequent to the time this form of theft was made a crime by the statute, i.e., August 24, 1937. Such a showing was essential, indeed jurisdictional, inasmuch as lacking it the prosecution would have been *ex post facto* under *Thompson* v. *Utah*, 170 U. S. 343.

The Circuit Court of Appeals for the Eighth Circuit on the first appeal held squarely that there was no evidence showing that the money found in petitioner's possession was "part of the fruits or proceeds of the offense" of the principal, that is, that it was money stolen by the principal *after* rather than *before* August 24, 1937. (102 F. (2d) 643, 648, App. p. 18.) The court said that there was no relevant evidence to support a verdict of guilty and that the petitioner's motion for a directed verdict should have been granted. The court said this in so many words (p. 649, App. p. 21).

In spite of this when the court reversed, instead of sending back the case with instructions to the Trial Court to

dismiss the prosecution and order the petitioner discharged (as in *Cornero* v. *U. S.*, 48 F. (2d) 69, C. C. A. 9th), the court sent it back with instruction to grant a new trial. At the second trial the evidence was likewise meager, but sufficient proof was eked out to show that Sixty Dollars ($60.00) of the Five Thousand Nine Hundred Three Dollars ($5,903.00) found in petitioner's possession was only issued as currency subsequent to August 24, 1937, the vital date. This, according to the Trial Court, with certain other circumstances was sufficient evidence upon which the case could have been submitted to the jury, and the jury, having acquitted the petitioner of misprision under Count Two (which is not here involved), convicted him on Count One of being accessory after the fact. A second appeal based upon the insufficiency of the evidence, (see motion for a directed verdict, R. 449, and in arrest of judgment, R. 20) having been made and denied, the court below affirmed on the ground that there was sufficient evidence to go to the jury, the court being compelled subsequent to verdict to scrutinize it from the viewpoint most favorable to the Government (R. 586).

Present counsel were only retained November 11, 1940, and being aware of the decision of the Circuit Court of Appeals for the Eighth Circuit in *Duncan* v. *Montgomery Ward Co.*, 108 F. (2d) 848, cert. granted by this Court April 8, 1940, and now pending, and likewise of the decision of the Circuit Court of Appeals in *Conway* v. *O'Brien*, 111 F. (2d) 611, cert. granted 1940, now pending (see also *Berry* v. *U. S.*, 111 F. (2d) 615, cert. granted, now pending) and likewise having their doubts as to whether the doctrine of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, either still exists, or if it still exists is applicable to a criminal case, filed below a petition for rehearing raising the question of the right of the Circuit Court of Appeals on the first appeal to send back the case for a new trial instead

of for a dismissal and discharge. Or, from another aspect, counsel argued that either by reason of the doctrine of former jeopardy or *res judicata* the petitioner was entitled to and is now entitled to a dismissal, the entire question being apparent on the face of the record and constituting a form of plain error unassigned. It was pointed out to the court below that the cases holding that former jeopardy must be pleaded and cannot be raised *de novo* in an appellate Court were cases of the usual sort, wherein some question of fact might be involved, which is not the present case wherein the question is one solely of law appearing on the face of the record. Hence, it was argued that the court below could validly notice the error, if convinced that it was an error, and could grant the rehearing. Inasmuch as this Court in *Ex Parte Neilson,* 131 U. S. 176, and *Ex Parte Snow,* 120 U. S. 274, and recognized that the defense of double jeopardy was truly jurisdictional in character and could be raised by *habeas corpus,* there is obviously no reason why it should be specially asserted at the trial if it appears otherwise in the record as a pure question of law. The Government can meet the argument as well now as then.

As the petition for rehearing below was only filed November 19, 1940, the date the present petition for a writ of certiorari is being filed, we respectfully ask this Court to defer consideration of the present petition until the court below has ruled upon the case.

Questions Presented.

1. Whether the petitioner was not entitled at the second trial to the dismissal of the case and to discharge from custody on the ground that the Circuit Court of Appeals in reversing should not have sent back the case for a new trial, but should have ordered a judgment for petitioner.

Petitioner's theory is that either because of the constitutional protection against double jeopardy, the doctrine of *res judicata,* or the requirement that the Appellate Court should dispose of the case as right and justice may require (28 U. S. C. A. Sec. 876) he was entitled to a dismissal. The Appellate Court's decision was a constructive acquittal.

2. Where there is an insufficiency of evidence (not a mere error in admission or exclusion of evidence or other error of law) and a directed verdict should have been entered for defendant, is the Appellate Court under the doctrine of *Slocum* v. *New York Life Insurance Co.,* 228 U. S. 364, compelled to send the case back for a new trial, or is it not required in a criminal case to enter final judgment? We believe that the doctrine of *Slocum* v. *New York Life Insurance Co., supra,* is inapplicable to a criminal case, but if hitherto applicable we ask that the doctrine as applied to a criminal case like the present be specifically overruled.

3. As a safeguard under *Alice State Bank* v. *Houston Pasturage Co.,* 274 U. S. 240, in the event this Court grants certiorari, we feel it only fair to argue that the facts are entirely insufficient to permit the case to have gone to the jury, there being no personal aid given the felon (4 Bl. Com. 37) and the facts showing at most the receipt of stolen property.

Argument.

It may be seriously questioned whether the doctrine of *Slocum* v. *New York Life Insurance Co.,* 228 U. S. 364, is in line with current legal thought. It is significant that Rule 50 of the Rules of Civil Practise avoids the doctrine by enacting an automatic reservation of the power in the Trial Court to enter the right judgment no matter what the verdict of the jury. As a result of this the Appellate Court has power to order the Trial Court to enter the judgment

that should have been entered, whether for plaintiff or defendant.

Duncan v. *Montgomery Ward & Co.*, 108 F. (2d) 848 (C. C. A. 8th, Jan. 23, 1940, cert. granted April 8, 1940, U. S. S. Ct., undecided);

Conway v. *O'Brien*, C. C. A. 2nd, 111 F. (2d) 611, cert. granted 1940, now pending;

Berry v. *U. S.*, C. C. A. 2nd, 111 F. (2d) 615, cert. granted 1940 now pending;

Massachusetts Protective Assn. v. *Mouber*, C. C. A. 8th, 110 F. (2d) 203, 207;

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Baltimore & C. Line v. *Redman*, 295 U. S. 654;

Leader v. *Apex Hosiery Co.*, 108 F. (2d) 71, 81;

Millers Mutual Fire Insurance Assn. v. *Warroad Potato Assn.*, C. C. A. 8th, 94 F. (2d) 741, 743.

Inasmuch as the new rules cannot change substantive rights, it would seem to follow that unless Rule 50 of the Rules of Civil Practise should be held invalid, the change is merely procedural and probably results from the abandonment of the rigid doctrine of the majority opinion in the *Slocum* case, and the adoption in its stead of what seems to us the convincing argument in the dissenting opinion of Mr. Chief Justice Hughes in that case, concurred in by Justice Holmes and several other Justices.

The dissenting opinion seems to us absolutely conclusive in a criminal case, disavowing as it does the argument in the majority opinion that a new trial should be had to give the plaintiff (here the Government) the opportunity to repair by new evidence omissions and defects of proof at the first trial. Certainly no such doctrine ought to exist in a criminal case, public policy being entirely the other way and firmly dictating that the Government should be pre-

pared when it first goes to trial, and that the defendant should not be worn out by a succession of trials collaborated in by the Appellate Court to the extent of giving helpful hints to the Government.

The further argument in the majority opinion in the *Slocum* case that a new trial was necessary because of the right of the parties to a jury trial under the Seventh Amendment is obviously inapplicable to a criminal case, where the right to a jury trial is the right of the defendant and not of the Government, and so may be waived or dispensed with in a proper case (*Patton* v. *U. S.*, 281 U. S. 276). Obviously a defendant is losing no constitutional right, as the plaintiff theoretically was losing it in the *Slocum* case, when in a criminal case the Appellate Court orders a final judgment in his favor. On the other hand, he *is* losing a substantial right when the case on reversal is sent back for a new trial, *i.e.*, his right to be protected against double jeopardy or his right to the doctrine of *res judicata* (*Oppenheimer* v. *U. S.*, 242 U. S. 85).

Lastly, as to the suggestion in the majority opinion in the *Slocum* case that apart from constitutional limitations there was no way at common law upon reversal of a case at law to do other than to award a new trial, this suggestion seems not only repudiated in the dissenting opinion but likewise repudiated by this Court in promulgating Rule 50 of the New Rules of Civil Practice. It can hardly be supposed that this Court would have interpreted the empowering statute which led to the New Rules to hold that it conferred authority to dispense with a jury trial where such a right existed. Hence, aside from the majority opinion in the *Slocum* case, this Court must have deemd the right of the Appellate Court to enter final judgment as already existing, no doubt under the appellate statute giving this Court and the Circuit Court of Appeal power on appeal to dispose of the case as law and justice might require (28 U. S. C. A.,

Sec. 876, held applicable to criminal cases in *Ballew* v. *U. S.*, 160 U. S. 187, and *Farrar* v. *Wheeler*, 145 Fed. 482; see also *Haynes* v. *U. S.*, 101 Fed. 817, 818; *Gardes* v. *U. S.*, 87 Fed. 172, and *Whitworth* v. *U. S.*, 114 Fed. 302, 305).

We feel therefore that no statute (other than 28 U. S. C. A. 876 relative to appellate power) was necessary to give the Court below power to enter judgment for the defendant when it reversed. This Court recognized the power in *Ballew* v. *U. S.*, 160 U. S. 188 and the Circuit Court of Appeals for the Ninth Circuit did the same in *Cornero* v. *U. S.*, 48 F. (2) 69. (See also cases cited at end of last paragraph.) The propriety and necessity of such a judgment seems obvious. Had the Trial Court ruled as the Appellate Court said it should have on defendant's motion for a directed verdict, the defendant would have been released on the spot. It seems, therefore, that an Appellate Court should inherently have the power to place him in the position he should have enjoyed before but for the Trial Court's error. Only in such a way can he be said to have obtained the full benefit of his appeal. Conversely, if the Appellate Court orders a new trial for the purpose of allowing the Government to piece out its deficiencies in proof by new evidence to be obtained under the guidance of the Appellate Court's opinion, it may well be questioned whether, though the Government has no power of appeal in a criminal case (*Cf. Palko v. Conn.*, 302 U. S. 319), it has not reaped the benefit of an appeal which has been predominantly in the Government's favor by allowing it to make valid at a second trial what was invalid at the first.

It is felt, therefore, that every argument of sound public policy, and indeed of fundamental concepts of fairness, points to the rule herein contended for. It is not believed that there is any jurisdictional objection. Nor is it felt that there is any merit in the technical objection that the defense of former jeopardy or *res judicata* should have been

raised at the second trial, otherwise they are waived. Where the jurisdictional error complained of (and this Court has held the error jurisdictional in *Ex Parte Neilson*, 131 U. S. 176 and the other cases already cited) appears on the face of the record, it would seem heartless to contend that the defendant cannot raise the point at this time. There is no alleged "waiver" of the constitutional defense that can be spelled out. The defendant has not waived it. He is asserting it here and in the Court below by his petition for rehearing. If upon that petition or this petition the Court can decide the point we see no argument except one of routineer technicality in claiming that he should have raised the point further back.

The distinction is emphasized once more between a case wherein as here a motion for a directed verdict should have been granted because of insufficient evidence and one wherein the error is in the admission or exclusion of evidence, the instructions of the judgment, misconduct of counsel, etc. (Cf. *Kepner* v. *U. S.*, 195 U. S. 100; *Trono* v. *U. S.*, 199 U. S. 521.) In cases of the latter character, it may be said that there is no jeopardy because no trial at all, in the legal sense, resulted. If, therefore, the defendant undertakes to have the Appellate Court so hold he trades whatever benefit he got out of the trial for the right to have the judgment set aside and a trial *de novo* awarded. In such a case the human error on the part of the court or government counsel in failing rightly to try the case must be excused on superior grounds of public policy. Where, however, the government having investigated a defendant, having presented evidence to a grand jury and secured an indictment, solemnly announces that it is ready and puts the defendant in jeopardy of life or limb before his peers, an equal public policy should dictate that the government should have but one opportunity, and where no case has been made out against the defendant he should rightly be

discharged. The Appellate Court should so order on the basis of a constructive acquittal.

Reasons for the Allowance of the Writ.

We feel the foregoing shows an important question of constitutional and criminal law which has not been but ought to be settled by this Court.

Conclusion.

It is respectfully submitted that the petition herein should be granted and the judgment below reversed with instructions to the Trial Court to dismiss the prosecution and discharge the defendant.

Respectfully submitted,

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APPENDIX.

CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT, APRIL 13, 1939.

No. 11177.

NEAL

vs.

UNITED STATES

Woodrough, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Minnesota; Gunnar H. Nordbye, Judge.

William Squire Neal was convicted of being an accessory after the fact to a felony, and of misprision of felony, and he appeals.

Reversed and remanded with instructions.

Harry S. Swensen, of Minneapolis, Minn. (Eugene A. Rerat and John Ott, both of Minneapolis, Minn., on the brief), for appellant.

Victor E. Anderson, U. S. Atty., of St. Paul, Minn. (Linus J. Hammond, Asst. U. S. Atty., of St. Paul, Minn., on the brief), for the United States.

Before Stone, Woodrough, and Thomas, Circuit Judges.

THOMAS, Circuit Judge:

The appellant William Squire Neal, hereinafter called defendant, was indicted, tried and convicted in the court below upon both counts of an indictment containing two counts, and he appeals.

The first count of the indictment charged defendant with being an accessory after the fact to a felony committed by John L. Neal; and the second count charged misprision of the same felony committed by John L. Neal. The defendant was sentenced to serve in a penitentiary for two years on each count, the sentences to run concurrently and not consecutively.

Before trial the defendant interposed a demurrer to count one of the indictment, which was overruled. At the close of the evidence he moved for a directed verdict upon both

counts on the ground of insufficiency of evidence to support a verdict of guilty, which motion was overruled.

On this appeal the defendant urges that the trial court erred (1) in overruling his demurrer to count one of the indictment, (2) in overruling his motion for a directed verdict on both counts, (3) in the admission of certain evidence over his objection, (4) in permitting misconduct of the prosecuting attorney in his argument to the jury, and (5) in giving certain instructions to the jury.

Since the sentences run concurrently, if the defendant was properly convicted upon either count of the indictment, there can not be a reversal even if there were reversible error on the trial of one of the counts. The defendant in that situation is not prejudiced by the sentence on the count in which the conviction is tainted with error. Roberts *v.* United States, 8 Cir., 96 F. 2d 39, 40; Little *v.* United States, 8 Cir., 93 F. 2d 401, 409; Taran *v.* United States, 8 Cir., 88 F. 2d 54, 59; Madelin *v.* United States, 7 Cir., 46 F. 2d 266; United States *v.* Trenton Potteries Co., 273 U. S. 392, 47 S. Ct. 377, 71 L. Ed. 700, 50 A. L. R. 989.

The alleged error most seriously pressed upon our attention, and the one involving the greatest difficulty, relates to the sufficiency of the evidence to support a conviction upon either count. If this assignment of error be sustained the court erred in overruling defendant's motion for a directed verdict and the judgment must be reversed. In that event it will be unnecessary to consider the other alleged errors. This question requires a consideration of the indictment and a review of the government's evidence.

The defendant and John Neal are brothers. At all times material to this case they lived in Minneapolis, Minnesota. The defendant was married and operated an undertaking establishment. His brother John was a bachelor and lived in defendant's home. John had been employed as clerk or messenger in the office of the treasurer of the Soo Line railroad at Minneapolis for 32 years prior to December 28, 1937. In February, 1938, John was indicted in the United States District Court of Minnesota and charged in ten counts with stealing and carrying away various sums of money from the First National Bank and Trust Company of Minneapolis. He pleaded guilty on five counts and was

sentenced to 15 years in a penitentiary. The indictment was predicated upon the amendment of August 24, 1937, to section 2(a) of the Act of May 18, 1934; 48 Stat. 783, 12 U. S. C. sec. 588b, 12 U. S. C. A. sec. 588b. The original statute made bank robbery a crime. The pertinent part of the amendment added: "whoever shall take and carry away, with intent to steal or purloin, any property or money or any other thing of value exceeding $50 belonging to, or in the care, custody, control, management, or possession of any bank, shall be fined not more than $5,000 or imprisoned not more than ten years, or both."

The counts of the indictment to which John Neal pleaded guilty and on which he was sentenced charged him with stealing and carrying away from the bank $97.50 on December 27, 1937; $97.50 on December 24, 1937; $97.50 on December 23, 1937; $95 on December 22, 1937; and $97.50 on December 21, 1937.

The crimes of accessory after the fact and misprision of felony being dependent or subsidiary offenses the indictment upon which the defendant was tried alleged two crimes in each count. John L. Neal is referred to as principal, or the one who committed the primary felony, and the defendant is charged with the dependent offenses. In each count the felony attributed to John L. Neal is that between August 24, 1937 (the date of the amendment to the bank robbery statute supra), and December 28, 1937, he stole and carried away from the possession of the First National Bank and Trust Company of Minneapolis many thousands of dollars.

In the first count the crime of which the defendant is accused is that he knowing that the principal had committed and completed the felony above described became on January 7, 1938, an accessory after the fact thereto in that he aided and assisted the principal in secreting the fruits and proceeds of the felony by clandestinely placing $5,903 of the stolen money in a golf bag in his living quarters, thus suppressing important evidence, to the end that the principal might escape punishment.

In the second count it is alleged that on or about January 7, 1938, the defendant committed the crime of misprision of felony in that with full knowledge of the felony committed by John L. Neal he concealed and failed to disclose and

make known such felony as soon as might be to some one of the judges of the United States District Court of Minnesota or to the Attorney General of the United States or to the United States Attorney or to other persons in civil authority. It is further charged that the defendant took two affirmative steps to conceal the crime committed by his brother John: first, he concealed $5,903 of the stolen money in a golf bag at his living quarters; and, second, he altered and expunged from the account books of the Neal Funeral Home operated by him entries showing the investment therein by John L. Neal of the stolen moneys.

To warrant a conviction by the jury on the first count of the indictment burden was upon the government to establish beyond a reasonable doubt: (1) That John L. Neal, the principal, had committed and completed the felony charged, that is, that between August 24 and December 28, 1937, he had unlawfully taken and carried away from the First National Bank and Trust Company of Minneapolis many thousands of dollars; (2) that the defendant had knowledge that the principal had committed the felony; and (3) that having such knowledge, defendant aided and assisted the principal to escape punishment by suppressing important evidence against him in that he concealed $5,903 which constituted a large part of the fruits and proceeds of the offense.

To sustain a conviction on count two for misprision of felony it was incumbent upon the government to prove beyond a reasonable doubt (1) that John L. Neal, the principal, had committed and completed the felony alleged prior to January 7, 1938; (2) that the defendant had full knowledge of that fact; (3) that he failed to notify the authorities; and (4) that he took two affirmative steps to conceal the crime of the principal, viz., (a) he concealed $5,903 of the stolen money in a golf bag, and (b) he knowingly altered and expunged from the books of account of the Neal Funeral Home entries showing the investment of John L. Neal therein, which money so invested was a part of the stolen money.

In brief, the evidence introduced by the government to prove the crime of the principal John L. Neal tended to establish the following facts:

John L. Neal, as a clerk or messenger in the office of the Treasurer of the Soo Line railroad company, received a salary of $140 a month. Under its system of doing business the railroad company had its station agents send their daily collections directly to the bank for deposit to the credit of the company, with the exception of rent money, which they were instructed to send directly to the treasurer of the company at Minneapolis. The agent before sending the money made a deposit slip in quadruplicate, one of which he retained. The money, the original and one copy of the deposit slip were sent directly to the bank and one copy was sent to the auditor of the railroad company. The envelopes containing the deposits were delivered every morning to the teller in the "railroad cage" at the bank. John L. Neal called at the teller's cage about 10:30 in the morning and obtained the extra copy of the deposit slip and took it to the office of the treasurer of the railroad company where he made a record of receipt by the bank of the deposit after which he turned the deposit slip over to the auditor as notice that the money had been received by the bank. The auditor then returned one copy of the slip to the agent to serve as a receipt to him for the deposit.

In many instances the agents sent rent collections with the deposit to the bank instead of sending such items directly to the treasurer of the company. The rent item was separately enclosed and had an identifying mark on it indicating that it was not for deposit but was for the treasurer of the company. The railroad teller at the bank would turn over the rent items to John L. Neal for delivery to the treasurer when John called at the bank in the morning.

For a period of approximately seven years immediately preceding December 27, 1937, John L. Neal made a practice of telling the bank teller when he made his usual call that of the general deposit received from a particular agent a part thereof, for instance $97.50, was rent money and that it should be turned over to him for delivery to the treasurer. The statement was false, but the teller relying on it would turn over the amount demanded. The money turned over was not taken from the funds remitted by the particular agent designated, but from money generally on deposit at the cage. The original deposit slip held by the bank would

then be changed accordingly but not the copy which Neal took to the treasurer's office. The money so received by him he kept. He kept an account of the items thus abstracted and covered up his offense by false entries and forged deposit slips. Neal's record showed that the amount of money thus taken by him over the seven year period amounted to $118,-280. The bank's record showed the amount to be $82,872.50. During the entire year 1937 the amount taken was about $53,000, and after August 24, 1937, approximately $18,000 or $19,000.

John L. Neal had no express authority to withdraw money from the bank, and the teller at the bank had no instructions to turn the money over to him. The defendant claims that both John L. Neal and the bank teller had implied authority to handle the moneys the way they did, but the evidence was not such as to require the jury so to find.

The evidence on the trial of the defendant tended to show that he lived with his family upstairs over his funeral parlor in Minneapolis. His brother John lived with him. In 1935 he had his business incorporated under the name Neal Funeral Home, Inc. He was president, his wife vice president, John L. Neal treasurer, and an employee, Otis Allen, secretary. The defendant treated the business as his own. He paid no salaries to the officers and he handled the money himself. The obligations of the business were in his name, and he owned the home. His income in 1935 was $2,385.46, and in 1936, $2,739.15. Yet he had property in excess of the amount usually owned by one of such moderate income. John furnished the groceries for the family amounting to $75 to $80 a week. He also made investments in the business. During 1935, 1936 and 1937 he contributed to the business the sum of $12,970.71 in various amounts and at various times, and he withdrew during the same period the sum of $3,150, leaving a net balance of $9,820.71.

John L. Neal disappeared on the night of December 27, 1937. About 2:00 a. m. on the morning of December 28, 1937, the defendant found on the premises $5,903 in paper currency in an old iron box. He removed the money and placed it in an old laundry bag which he placed in his closet. When questioned by officers he admitted finding only $15 of John's money.

On the evening of December 29, 1937, the defendant called the bookkeeper for the funeral home and employed him to delete John L. Neal's name from the books. The bookkeeper rewrote about 30 sheets having John L. Neal's name thereon, omitting the name and substituting other explanations for the items. The rewritten sheets and the originals were turned over to defendant's secretary Allen on January 31, 1938, but the bookkeeper then took the originals and kept them until February 17, 1938.

The evidence discloses that the defendant knew where John L. Neal was in hiding following December 27, 1937, but although examined frequently by federal investigators denied all knowledge of his whereabouts until in January, 1938. On January 5, 1938, he directed an officer to John's hiding place, and John was arrested. On January 6, the defendant told the officers that he had found $5,903 in an old iron box in John's room and had placed it in a golf bag upstairs in his room.

As applicable to both counts we think there was substantial evidence to support the conclusion of the jury that John L. Neal, the principal, was guilty of the felony charged against him, and that the defendant had knowledge of that fact as alleged in the indictment. There is no claim that the defendant believed or was informed that his brother John earned or had by any honest means obtained the large sums of money which he contributed to the funeral home or from which he paid the family grocery bills. The close relationship between the two brothers precluded ignorance of each other's resources. His conduct on and after December 28, 1937, and his concealing information of John's whereabouts were proper subjects for the consideration of the jury, and all the circumstances taken together virtually compelled a finding of guilty knowledge. Keliher v. United States, 1 Cir., 193 F. 8, 9; McDonald v. United States, 8 Cir., 89 F. 2d 128.

The serious question under count one of the indictment is whether there is substantial evidence to support the charge that the defendant aided and assisted the principal to escape punishment by suppressing evidence against him by concealing the $5,903 found in the old iron box in a golf bag. The charge in the indictment is that the defendant

concealed $5,903 which constituted a large part of the fruits and proceeds of the offense of the principal and was important evidence against him. The proof does not show when the $5,903 was placed in the old iron box by John. John's salary was only $140 a month. Over a period of seven years he sole approximately $118,000. During 1937 he stole $53,000 of this sum, and after August 24th of that year he had taken approximately $18,000 of the amount. The money stolen prior to August 24, 1937, did not constitute a federal offense, and the stealing of money prior to that date is not charged to be a crime in the indictment. The defendant's testimony is that when he opened the iron box on December 28, 1937, the paper money contained in it appeared to be old and was covered with a thick layer of dust. Early in January, 1938, the money was turned over to the officers, and they do not deny defendant's testimony with reference to its condition. The money consisted of 813 one-dollar bills and $5,909 of five, ten, twenty and fifty dollar bills.

The proof clearly does not tend to show that the $5,903 was a part of the "fruits or proceeds of the offense" of the principal, that is, that it was money stolen by John after rather than before August 24, 1937. Evidence which is consistent with each of two hypotheses proves neither, Prudential Insurance Company v. King, 8 Cir., 101 F. 2d 990, decided February 25, 1939; and when all of the substantial evidence is as consistent with innocence as it is with guilt, it is the duty of the appellate court to reverse a conviction, Shama v. United States, 8 Cir., 94 F. 2d 1, 4; Fulbright v. United States, 8 Cir., 91, F. 2d 210; Haning v. United States, 8 Cir., 21 F. 2d 508; Wright v. United States, 8 Cir. 227 F. 855. Nor is there any presumption in the absence of proof that the $5,903 was a part of the money stolen after August 24, 1937, rather than that it was a part of the money stolen before that date. United States F. & G. Co. v. Des Moines Nat. Bank, 8 Cir., 145 F. 273, 279.

The government does not deny that the allegations and the proof upon this point do not correspond, but counsel say the variance is not material. Berger v. United States, 295 U. S. 17, 82, 55 S. Ct. 629, 630, 79 L. Ed. 1314, is relied upon. The test of a material variance is there stated to be "(1) that the accused shall be definitely informed as to the

charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." We are of the opinion that the variance in this instance is material and prejudicial. The indictment informed the defendant that the government would prove that the $5,903 was a part of that stolen after August 24, 1937, and not that it might be a part of that taken sometime during the preceding seven years. The defense, had it been alleged that the $5,903 was a part of the money taken before that date, would be altogether different from the defense if it were alleged that it was taken afterwards. Even though the description were unnecessary in the indictment it devolved upon the government to prove it as laid. Potter v. United States, 155 U. S. 438, 445, 15 S. Ct. 144, 39 L. Ed. 214.

It is insisted further that the indictment charges that the $5,903 found in John's room after his disappearance on December 28, 1937, constituted evidence admissible against the principal, had he been tried for the felony charged against him, and that it is therefore admissible against the defendant. This theory would regard the allegation that the money was the fruit of the offense as surplusage. It fails also to distinguish between admissibility of evidence against the principal and evidence which constitutes substantial proof of the dependent offense.

This argument is sufficiently plausible and important, however, to make it expedient to examine the question of whether or not, were the record on the trial of the principal the same as the record in this case, the $5,903 found in the iron box would be relevant evidence against him.

The general rule in favor of the admission of such evidence is stated thus in 36 C. J. 894: "When money has been stolen and the evidence against the accused is largely circumstantial, it has been held proper to admit in evidence * * * as showing a possible motive for the crime. * * * The possession by accused of money immediately or shortly after the theft * * * and for stronger reason is such evidence admissible when there is proof both of the impecuniosity of accused before the larceny and the possession by him of considerable money for a person in his

circumstances immediately afterward, as such a sudden accession of wealth by defendant, contemporaneous with the larceny of money, tends strongly to connect him with the crime. To contradict this evidence accused may show that he had money just prior to the theft. * * *"

In short the evidence of possession of a large sum of money by the defendant immediately after a theft raises a presumption of fact that the money found is a part of the stolen money and that the defendant was connected with the theft. Under this general rule the foundation for the introduction of such evidence includes proof of (1) the "impecuniosity" of the defendant just before the theft, (2) and the "sudden accession" of wealth (3) contemporaneous with the theft. O'Shea v. United States, 6 Cir., 93 F. 2d 169; People v. Connolly, 253 N. Y. 330, 171 N. E. 393; Davis v. Commonwealth, 154 Ky. 774, 159 S. W. 607; Perrin v. State, 81 Wis. 135, 50 N. W. 516; 17 R. C. L. p. 68. The rule laid down by the Supreme Court adds the further burden upon the government of showing some necessary or natural connection between the sums in dependant's possession and those he is charged with taking. Williams v. United States, 168 U. S. 382, 396, 397, 18 S. Ct. 92, 97, 42 L. Ed. 509. In the cited case the defendant was convicted under an indictment charging extortion. Evidence was introduced under the general rule stated above showing that during the period of about three months when the extortions were taking place the defendant deposited in the bank $4750 although his salary was only $140 a month. In reversing the judgment of conviction, in connection with the statement of the rule quoted above, the court observed that "no sum so deposited corresponded in amount with the sums which he was charged with having extorted." This case is criticized by Prof. Wigmore in 1 Evidence sec. 154, where he states the rule thus: "Another mode, however, of making the fact of money-possession relevant is to show its *sudden possession*, i. e., to show that before the time of taking the person was without money, while immediately after that time he had a great deal; this reduces the hypothesis to such as involve sudden acquisition, and a dishonest acquisition thus becomes a natural and prominent hypothesis. On such

conditions the possession of unidentified money becomes relevant."

Upon the trial the government introduced facts in evidence in this case which destroy the presumption of fact and render the finding of the $5,903 irrelevant. While it was shown that the principal, John L. Neal, was receiving a salary of only $140 a month it was also shown that during the preceding seven years he had in addition to his salary received approximately $100,000, and that during the 9 months preceding August 24, 1937, his income had been approximately $200 a day. Here was no sudden acquisition of wealth after August 24th. It is true his large income prior to that date was the result of stealing, but such stealing was not a federal crime; and his possession of $5,903 after August 24th, without proof of acquisition after that date, would not raise a presumption that its acquisition was unlawful, or that it was a part of the fruits of his federal offense.

As the record stood at the close of the evidence there was no relevant evidence to support a verdict of guilty on count one of the indictment. The defendant's motion as to this count should have been sustained.

The second count of the indictment charges an offense under Title 18 U. S. C. A. sec. 251 (Cr. Code sec. 146), which provides that: "Whoever, having knowledge of the actual commission of the crime of murder, or other felony cognizable by the courts of the United States, conceals and does not as soon as may be disclose and make known the same to some one of the judges or other persons in civil or military authority under the United States, shall be fined not more than $500, or imprisoned not more than three years, or both."

The elements of the offense under the statute are two: There must be (1) a concealment of something such as suppression of the evidence or other positive act and (2) a failure to disclose. Proof of one of the elements only, and not of both, is not sufficient to support a conviction. Bratton v. United States, 10 Cir., 73 F. 2d 795, 797; United States v. Farrar, D. C. Mass.; 38 F. 2d 515, 517. The sufficiency of the charge is not assailed, but it is claimed that defendant did not fail to disclose "as soon as may

be''; that he did in fact as shown by the government's evidence disclose all that he knew on the fourth, fifth and sixth of January, 1938. The evidence also shows that he made no disclosures until after he had been frightened into doing so by the federal officers who were investigating the crime. He might have given them such information on the 28th of December, 1937, but instead of doing so he ''threw dust in their eyes'' when they interviewed him and gave them misleading information. Under the evidence it was a question for the jury to determine whether he made the disclosure ''as soon as may be'' to satisfy the requirements of the law.

We next consider the charge in the indictment that the defendant did two affirmative acts to ''conceal'' the crime of the principal. The first act charged was that he concealed $5,903 in a golf bag, ''which moneys unlawfully and feloniously had been taken and carried away by the said John L. Neal, with intent to steal the same, from the possession of'' the bank; and, second, that he knowingly altered and expunged from the books of account of the Neal Funeral Home entries showing the investment of moneys by John L. Neal, which moneys had unlawfully been taken and carried away from the possession of the bank by John with intent to steal the same.

The first alleged act, that the defendant concealed $5,903 of the money stolen by John L. Neal between August 24 and December 28, 1937, is not, as shown above, supported by the evidence.

Neither is the second alleged affirmative act of the defendant to conceal the crime of John L. Neal supported by substantial evidence. That charge is that the defendant expunged from the books of the funeral home the entries showing John L. Neal's investment of the stolen moneys in that business. There are only two entries in the books showing investments of John L. Neal in the funeral business after August 24, 1937. One of these shows that on October 15, 1937, he ''advanced'' $125 and the other that on October 19th he ''advanced'' the further sum of $100. There is no evidence whatever connecting these sums with the money unlawfully taken and carried away from the

bank; and the amount is not sufficient to raise a presumption of fact that they were not honest savings from his salary.

The basis in the evidence upon which the charge is founded is that the defendant did on December 29, 1937, instruct the bookkeeper to delete John L. Neal's name from the entries in the books. His name or his initials appeared in connection with certain entries on about 30 different sheeets of the books. The bookkeeper took these sheeets home with him and copied them substituting for the name or initials of John L. Neal other explanations such as "administration fees" or "W. Squire Neal." He returned them to the office of the funeral home on December 31, 1937, and delivered them to Otis Allen. He then took the original sheets home with him without the defendant's knowledge and made a second copy for himself. The originals were returned to the office on February 17, 1938, and placed in the books, where they remained and were produced at the trial unaltered. The defendant did not direct that the original sheeets be destroyed, although the bookkeeper suggested that they be burned. An intent to conceal from the government, if such intent existed, that is not carried out is not an offense under the statute.

The government argues that for a few days after December 27, 1937, the defendant aided in concealing John L. Neal, and that he is therefore guilty of misprision of felony. The evidence shows that he did know where John was in hiding and may have advised with him about escaping; but failure to inform the officers is not sufficient alone to constitute a crime under the statute. Bratton v. United States, supra.

The government having failed to produce any competent evidence to sustain one of the essential elements of the offense charged in count two of the indictment the motion for a directed verdict should have been sustained as to that count also.

Because the evidence fails to support the charges in each count of the indictment the judgment is reversed and the case remanded with instructions to grant a new trial.

WOODROUGH, *Circuit Judge* (dissenting)

It seems to me that the defendant was properly indicted, fairly tried and justly convicted under the accessory statute. Section 551, Title 18 U. S. C. A., Criminal Code, section 333.

It was clearly proved that defendant's brother John had been stealing small sums of cash from the Minneapolis bank day by day over a course of years and putting it in his pocket. Most of it he spent, but when he was caught he still had $5,903 hidden under his bed in a tin box. The defendant being cognizant of his brother's felony took the money from under the bed and secreted it in a golf bag in order to conceal that clue to his brother's crime. That made the defendant an accessory after the fact, as I see it.[1] True, the Federal statute does not define "accessory," but the meaning is long settled in common law. Any act knowingly done to aid a felon to cheat the law either of his person or the fruits of his crime constitutes the actor an accessory. The gist of the offense is the intent to cheat the law, the acts may vary infinitely. Where the felony of the principal is larceny of money I see no reason to restrict the accessory statute to the receiving of identified stolen money knowing it to have been stolen. Any act to cheat the law may suffice where the gist—the intent—is proven.

The indictment in this case was very carefully drawn to accord exactly with the established facts. The pleader knew that the identity of every dollar John stole was lost as soon as John stole it, because John immediately put his stealings in his pockets that were already well filled and none of it was marked. That being so, and the fact considered that John always spent many times what he earned, I can think of no better way to describe the fund or any part of it that remained in John's possession than to call it the "fruits or proceeds" of his stealing. That is what it was in ordinary acception and those are the appropriate

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[1] Blackstone Com. Vol. 2 IV, 37: "Any assistance whatever given to a felon to hinder his being apprehended, tried or suffering punishment makes the assistor an accessory."

descriptive words applied in the indictment to the ill-gotten gains that John hid under the bed and the defendant feloniously concealed from the law.

It is argued that the $5,903 cash under John's bed was not "important evidence" against him as alleged in the indictment, but it seems to me that it was. True, John confessed his stealings but the criminal law requires more than confession. The money hidden under the bed considered with the records and the confessions tended to establish the corpus delicti of John's offense. It would in the mind of a layman, and I think it would on a criminal trial. Not because it was suddenly acquired or unaccounted for wealth in John's possession, but because the presence of the money there under the bed corroborated and tended to bear out the amazing story of his stealings and what he had done with the loot. Nearly all of the great sum of $110,000 which John had stolen was gone without trace. There was nothing to show for it but some figures on paper. But the cash under the bed was tangible to the touch and visible to the eye. It was of the corpus delicti whether the state prosecuted for the stealings before the amendment to the federal bank robbery act or the federal government for those committed thereafter. In either case the relevant proof would be that over and above what John had earned and spent there was a remnant hidden under the bed not honestly earned but "fruits and proceeds" of his crime. His restoration of it after he was caught was merely by written document. But the money itself in a pile of coins and bills was "important evidence" for the jury.

I dissent because I think the conclusion unduly restricts the broad salutary accessory statute against helping thieves cheat the law. In the particular case I think there are extenuating circumstances but that guilt was proven.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 582

WILLIAM SQUIRE NEAL,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

MOTION TO DEFER CONSIDERATION OF THE PRESENT PETITION.

The substance of the present petition having been presented to the United States Circuit Court of Appeals for the Eighth Circuit by a Petition for Rehearing filed November 19, 1940, petitioner respectfully moves this Court to defer consideration of the present petition for a writ of certiorari until the Court Below has passed upon said Petition for Rehearing.

Respectfully submitted,

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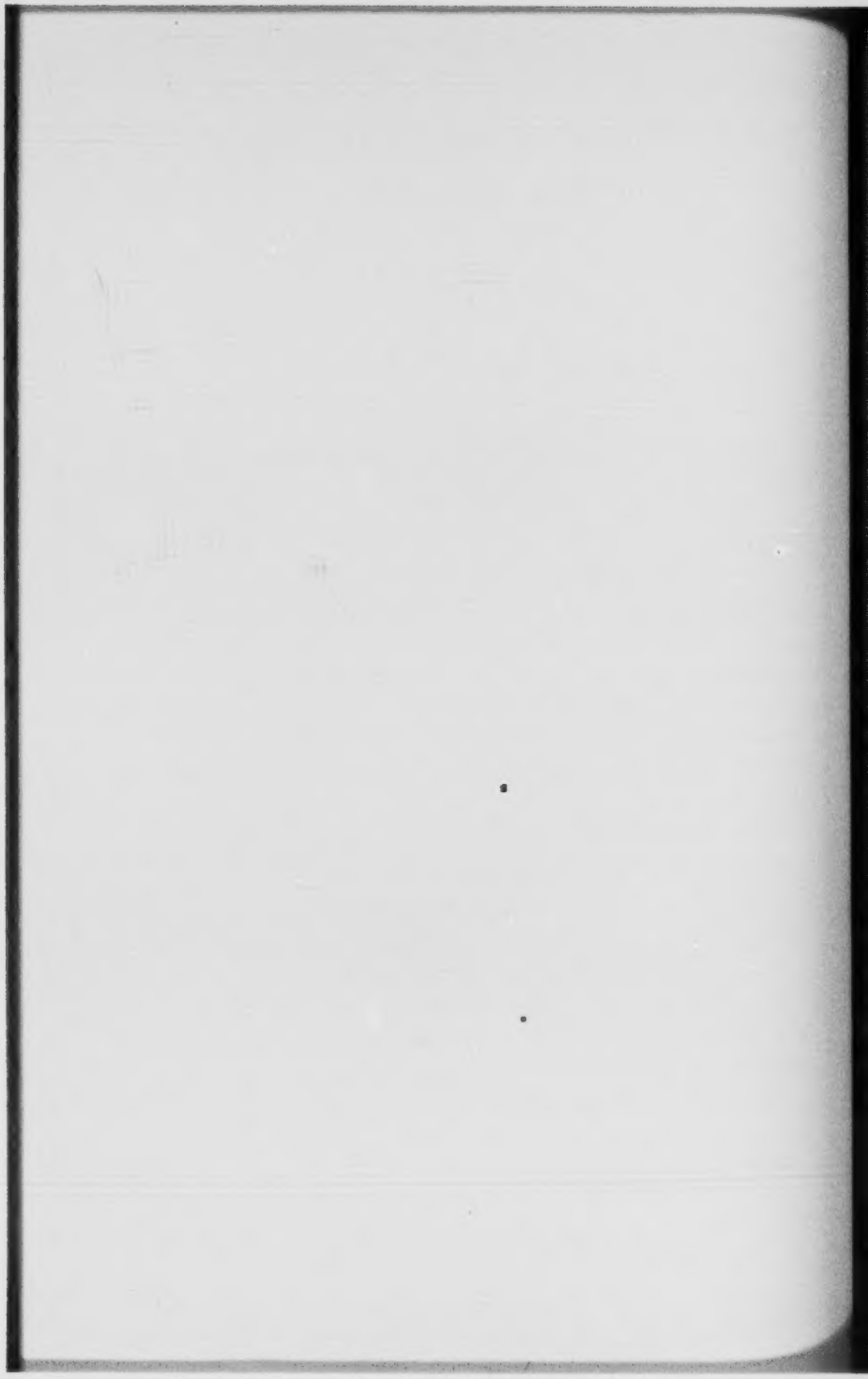

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 582

WILLIAM SQUIRE NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 586–589) on petitioner's second appeal has not yet been reported.[1]

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 15, 1940 (R. 590). The peti-

[1] The majority and dissenting opinions in the court below on the petitioner's first appeal are reported in 102 F. (2d) 643 and are set forth in full in the Appendix to the petition for a writ of certiorari (Pet. 11–25).

tion for a writ of certiorari was filed November 19, 1940. The day after this petition was filed the petitioner filed in the Circuit Court of Appeals a motion for leave to file a petition for rehearing, accompanied by the petition (R. 592, 594–604). The motion for leave to file the petition was granted on December 3, 1940 (R. 593), and the petition was denied on the same day (R. 605). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED[2]

After his original conviction was reversed by the Circuit Court of Appeals because of the insufficiency of the evidence in a certain respect and the case remanded for a new trial, the petitioner, without objection on his part, was retried and again convicted, which second conviction was affirmed by the Circuit Court of Appeals. In a petition for re-

[2] The petitioner reserves, but does not argue, the contention that the evidence was insufficient to warrant submitting the case to the jury because it showed at most the receipt of stolen property rather than aid given to a felon (Pet. 5). The Government, therefore, does not argue the point. Attention is directed, however, to the facts set forth in the opinion of the court below on the first appeal (Pet. 16–17) and the holding of the court below on the second appeal that "the evidence was clearly sufficient to support a verdict of guilt" (R. 589).

hearing following that affirmance petitioner for the first time challenged the action of the Circuit Court of Appeals on his first appeal in directing that the case be remanded for a new trial.

The question presented by the petition for a writ of certiorari is whether the Circuit Court of Appeals in reversing the judgment of conviction on the first appeal was required to remand the case with instructions to discharge the petitioner for the reasons that (1) a second trial would constitute double jeopardy, (2) a retrial was precluded under the doctrine of *res judicata,* and (3) the ends of justice require a reversal with instructions to discharge the defendant where a Circuit Court of Appeals holds that the evidence is insufficient.[3]

STATEMENT

In February 1938 the petitioner's brother, John L. Neal, was indicted in ten counts for stealing various sums of money from a national bank. He pleaded guilty to five counts of this indictment and was sentenced to the penitentiary. Theft from a national bank was first made an offense by the amendment of August 24, 1937 c. 747, 50 Stat. 749, to Section 2 (a) of the Act of May 18, 1934 c. 304,

[3] This question raises the further questions whether the petitioner waived his privilege against double jeopardy by appealing from his original conviction, whether *res judicata* can be invoked for the first time on appeal, and whether the petitioner timely challenged the action of the Circuit Court of Appeals in remanding the case for a new trial.

48 Stat. 783 (U. S. C., Title 12, Sec. 588 (b)) and the indictment was predicated on this amendment (Pet. 12–13).[4]

Petitioner has been tried twice on a separate indictment charging him with being an accessory after the fact with respect to the offense for which his brother John was convicted.[5] It was charged that he became an accessory after the fact on January 7, 1938, in that he aided in secreting the proceeds of the felony by concealing some $5,000 of the money which John had stolen, thus suppressing important evidence to the end that John might escape punishment (R. 3–5). On the first trial petitioner was convicted and sentenced to imprisonment for two years. On appeal, the petitioner asserted, *inter alia,* that his motion for a directed verdict should have been granted (Pet. 12). The Circuit Court of Appeals found that petitioner knew that John had committed the offense charged against him (Pet. 17) and intimated that the money which petitioner had secreted was a part of the

[4] All "Pet." references in this statement are to the majority opinion of the court below on the first appeal as printed in the Appendix to petitioner's brief (Pet. 11–23).

[5] This statement of facts pertains only to the first count of the indictment in two counts against the petitioner. The second count charged misprision of the same felony with respect to which petitioner was by the first count charged to have been an accessory after the fact (R. 5–6). Since the judgment on the second count was reversed on the first appeal and since petitioner was acquitted on that count at the second trial, the second count is not now involved.

money which John had stolen from the national bank over a period of seven years (Pet. 16, 17). The court held, however, that the petitioner's motion for a directed verdict should have been granted because the Government had failed sufficiently to prove that any part of the moneys concealed by the petitioner had been stolen by John after August 24, 1937, the date upon which it became a Federal offense to steal moneys from a national bank (Pet. 18). The court, therefore, reversed the judgment of conviction for insufficiency of the evidence, and remanded the case with instructions to grant a new trial (Pet. 23).

The petitioner did not attack the remanding of the case for a new trial either by a petition for rehearing in the Circuit Court of Appeals or by a petition to this Court for a writ of certiorari, and a second trial for the same offense was had without any objection on the part of petitioner. On that trial the Government undertook to prove that a part of the money concealed by the petitioner was stolen by John after August 24, 1937 (R. 587). Petitioner was again found guilty (R. 19) and sentenced to two years imprisonment and to a fine of $500 (R. 24–25). Upon appeal the petitioner again contended that the trial court should have granted his motion for a directed verdict, but the Circuit Court of Appeals held that upon the evidence the jury was warranted in finding that all of the money concealed by the petitioner was stolen

from the national bank and that part of it was stolen after August 24, 1937 (R. 589). The court accordingly affirmed the judgment of conviction. Thereafter, by leave of the Circuit Court of Appeals, the petitioner filed in that court a petition for rehearing attacking for the first time the action of the Circuit Court of Appeals in remanding the case for a new trial on the first appeal (R. 594–604).

ARGUMENT

(1) There is clearly no merit in the petitioner's contention that the Circuit Court of Appeals was powerless on the first appeal to remand the case for a new trial because of the double jeopardy doctrine. Assuming that double jeopardy may ever result from a second trial in the same case,[6] it is settled that where, as here, a defendant appeals from the judgment of conviction and obtains a reversal, he thereby waives his right to plead at the second trial that he has been once in jeopardy. *United States* v. *Ball,* 163 U. S. 662, 671; *Trono* v. *United States,* 199 U. S. 521, 533, 534; *Murphy* v. *Massachusetts,* 177 U. S. 155, 158; *Stroud* v *United States,* 251 U. S. 15, 18.[7] The

[6] See, however, Mr. Justice Holmes' dissenting opinion in *Kepner* v. *United States*, 195 U. S. 100, 134–135, and the opinion of the Court, written by Mr. Justice Cardozo, in *Palko* v. *Connecticut*, 302 U. S. 319, 322–323.

[7] Even in a case where a defendant is twice placed in jeopardy by a second trial, it has been uniformly held that he waives his privilege against double jeopardy by pro-

gist of these decisions is that the accused waives his privilege against double jeopardy because he has himself invoked the action of the appellate court which resulted in a further trial.

Petitioner asserts, however, that waiver of double jeopardy by appeal does not exist where the reversal occurs for insufficiency of the evidence because public policy dictates that the Government should have but one opportunity to make out a case against the defendant, but does exist in those cases in which the reversal results because of error in the admission or exclusion of evidence, erroneous instructions to the jury, misconduct of counsel, etc., for the reason that "In cases of the latter character, it may be said that there is no jeopardy because no trial at all, in the legal sense, resulted" (Pet. 9). Petitioner cites no authorities in support of this attempted distinction, and there is nothing in any of the decisions which deal with waiver of jeopardy by appeal which makes the application of the doctrine depend upon the ground or grounds upon which the reversal was predicated. There is as much reason for applying the waiver doctrine in one case as in the other, since in each the new trial

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ceeding to trial without asserting the privilege. *Levin* v. *United States*, 5 F. (2d) 598, 600 (C. C. A. 9th), certiorari denied, 269 U. S. 562; *Brady* v. *United States*, 24 F. (2d) 399, 405 (C. C. A. 8th); *Bracey* v. *Zerbst*, 93 F. (2d) 8, 9–10 (C. C. A. 10th). Here the question was first raised on petition for rehearing after affirmance by the Circuit Court of Appeals of petitioner's conviction on the second trial.

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was brought about by the action of the accused himself in appealing and securing a reversal of his conviction.

Ex parte Nielsen, 131 U. S. 176, cited by the petitioner, does not aid him. In that case there was no waiver of double jeopardy by appeal or otherwise.[8]

(2) Petitioner does not elaborate his contention that the reversal and remanding of the case for a new trial on the first appeal violated the doctrine of *res judicata*. On that appeal the Circuit Court of Appeals held that the evidence was inadequate because it did not sufficiently establish that the money concealed was money stolen from the national bank after August 24, 1937. This issue was not attempted to be relitigated at the second trial, the appellate court's decision was respected as the law of the case, and the Government's evidence was directed to supplying the deficiency in proof found by the appellate court.[9]

(3) The petitioner contends that the Circuit Court of Appeals was required, when it reversed

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[8] Since double jeopardy did not result because of petitioner's second trial, it would be profitless to discuss his contention that the defense of double jeopardy may be first made on appeal where it turns upon a question of law appearing on the face of the record as distinguished from some question of fact (Pet. 4). See, however, cases cited in footnote 7, *supra*, p. 6.

[9] It has also been held that the question *of res judicata* cannot be considered on appeal where, as here, it was not raised below. *Adams* v. *Shirk*, 117 Fed. 801 (C. C. A. 7th); *DeRees* v. *Costaguta*, 275 Fed. 172 (C. C. A. 2d), certiorari denied, 257 U. S. 648.

his conviction on the first appeal for insufficiency of the evidence, to order that he be discharged and that it should not have not remanded the case for a new trial. We submit (a) that the petitioner is not in a position to urge this contention and (b) that in any event the contention is without merit.

(a) The petitioner did not attack the judgment of the Circuit Court of Appeals remanding the case for a new trial either by a petition for rehearing or by a petition to this Court for a writ of certiorari. On the contrary he submitted to a second trial without objection and did not question the propriety of his retrial until after the court below had affirmed his second conviction. Under these circumstances, we submit that petitioner's challenge to the judgment of the Circuit Court of Appeals came too late, particularly since, as is hereinafter indicated, the action of the Circuit Court of Appeals in remanding the case for a new trial was, at most, the exercise of a discretionary power. The proper administration of justice requires that a defendant seek direct and prompt review of alleged error by an appellate court.

(b) Petitioner cites no decision which supports his view that a Circuit Court of Appeals, when it holds that a motion for a directed verdict should have been granted for insufficiency of the evidence, is required to direct that the defendant be discharged. He asserts, however, that the Circuit Court of Appeals should have ordered his dis-

charge because he would have been released on the spot if the trial court had granted his motion for a directed verdict as the Circuit Court of Appeals held it should have done.

In *Collenger* v. *United States,* 50 F. (2d) 345,[10] the only Federal case in which the question was directly presented, motions for a directed verdict had been overruled, the Government conceded on motions for arrest of judgment that the evidence was insufficient, and the defendants contended both in the District Court and in the Circuit Court of Appeals that their discharge should be ordered because a verdict for their acquittal should have been directed by the District Court and that had this been done they could not again be tried on the same charge. The Circuit Court of Appeals for the Seventh Circuit held, however, that it had no right to discharge a defendant where the evidence was inadequate but was required under the decision of this Court in *Slocum* v. *New York Life Ins. Co.,* 228 U. S. 364,[11] to remand the case for a new trial. The defendants filed in this Court a petition for a writ of certiorari in which the sole question presented was the correctness of this ruling. This Court, however, denied certiorari (284 U. S. 654).

[10] Followed in *Caringella* v. *United States*, 78 F. (2d) 563, 567 (C. C. A. 7th).

[11] The *Slocum* decision was re-affirmed by this Court in *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389, 394.

In *Ex Parte United States,* 101 F. (2d) 870 (affirmed by an equally divided court, *United States* v. *Stone,* 308 U. S. 519), in which the Circuit Court of Appeals for the Seventh Circuit upheld the right of a trial judge to render a judgment *non obstante veredicto* pursuant to the reservation of a ruling on a motion for a directed verdict, the court stated that the effect of its decision in the *Collenger* case was to condemn a judgment *non obstante veredicto* made without reservation (p. 877, note 21). It is, therefore, evident that the court in the *Collenger* case felt that it was compelled to remand the case for a new trial because a discharge of the defendants would have been tantamount to a judgment *non obstante veredicto* without reservation. This but recognizes that since a trial court cannot, at least without reservation, set aside a verdict of guilty upon reaching the conclusion that the evidence is insufficient, except by granting a new trial,[12] a Circuit Court of Appeals is equally powerless to do so.

Petitioner does not refer to the *Collenger* case but questions the soundness of the *Slocum* decision [13] and its application to Federal criminal cases.

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[12] A motion for arrest of judgment cannot be based upon insufficiency of the evidence to support the verdict. *United States* v. *Stern,* 186 Fed. 854 (D. E. D. Penn.), aff'd 193 Fed. 888 (C. C. A. 3d); *United States* v. *Marrin,* 159 Fed. 767 (D. E. D. Penn.), aff'd 167 Fed. 951 (C. C. A. 3d), certiorari denied, 223 U. S. 719.

[13] In this connection petitioner refers (Pet. 5–6) to Rule 50 of the New Civil Procedure Rules providing for auto-

His position is that a Federal appellate court has the power to dispose of a criminal case as right and justice may require [14] and that the ends of justice require that where a Circuit Court of Appeals reverses a conviction for insufficiency of the evidence it should remand the case with directions to discharge the defendant.

It is unnecessary here to consider either the soundness of the *Slocum* case or its application to criminal cases. For there is nothing to show that the court below proceeded on the assumption that it was required to grant a new trial. And clearly it was not required to order the discharge of the defendant. We have found no decision which so holds and the petitioner has cited none. Indeed, where a judgment of conviction is reversed because the trial court erroneously failed to direct a verdict in favor of the defendant, it is the frequent practice for the Circuit Courts of Appeals to order a new trial. For example, see *Backun* v. *United States,* 112 F. (2d) 635, 639 (C. C. A. 4th); *Leslie* v. *United States,* 43 F. (2d) 288 (C. C. A. 10th); *Ridenour* v. *United States,* 14 F. (2d) 888 (C. C. A. 3d); *Holmes* v. *United States,* 275 Fed. 49 (C. C. A. 4th); *Duff* v. *United States,*

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matic reservation of decision on a motion for a directed verdict. It suffices to say that there is no similar rule with reference to Federal criminal procedure.

[14] Citing *Ballew* v. *United States,* 160 U. S. 187, and various lower Federal court decisions.

185 Fed. 101 (C. C. A. 4th). And, of course, even in the absence of such a direction a new trial is had unless the opinion of the appellate court clearly shows that the court to which its mandate is directed must follow some other course. Cf. *Stroud* v. *United States,* 251 U. S. 15, 17; *Steinman* v. *United States,* 185 Fed. 47 (C. C. A. 3d).

It would, we submit, have been contrary to the ends of justice for the Circuit Court of Appeals in the instant case to have directed the petitioner's discharge upon the reversal of his first conviction. The ends of justice demand that, except where double jeopardy constitutes a barrier (Cf. *Cornero* v. *United States,* 48 F. (2d) 69 (C. C. A. 9th)), a person guilty of a crime be convicted and punished. In the instant case the two opinions of the Circuit Court of Appeals make it manifest that at the first trial the Government had abundantly proved all of the elements of the offense charged against the petitioner (see Pet. 17; R. 587) except that, in the view of two of the judges, it had failed sufficiently to establish that any part of the stolen money concealed by the petitioner was taken from the national bank after August 24, 1937, when it first became a Federal offense to steal money from such a bank. Plainly, under these circumstances, the ends of justice did not dictate that the Circuit Court of Appeals should have allowed the peti-

tioner to go free, particularly when there was no reason for that court to believe that the Government would be unable to supply the deficiency in proof which the court had pointed out. In a somewhat analogous situation the Circuit Court of Appeals for the Fourth Circuit, in *Backun* v. *United States,* 112 F. (2d) 635, 639 *supra,* in reversing a conviction for insufficiency of the evidence in certain respects and in remanding the case for a new trial, said that "It may be that, upon such new trial, it will be possible to identify additional silver in the possession of Zucker as having been stolen, or to show otherwise that the value of the stolen silver transported in interstate commerce came within the valuation fixed by the statute." See also *Caringella* v. *United States,* 78 F. (2d) 563, 567 (C. C. A. 7th), *supra.*

Cornero v. *United States,* 48 F. (2d) 69 (C. C. A. 9th), cited by the petitioner, is clearly not in point. In that case the Circuit Court of Appeals, in view of its finding that the defendant's plea of former jeopardy was meritorious and timely, was of course required to discharge him. In the instant case, as we have heretofore shown, there is involved no question of double jeopardy.

CONCLUSION

Petitioner's contentions are clearly without merit and there is involved no conflict of decisions.

We therefore respectfully submit that the petition for writ of certiorari should be denied.

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